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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MEMORANDUM FOR PETITIONER.

Supplementing what has been said in the briefs and oral arguments of the Petitioner, the following is added: In the instant case, a divided Court (C. C. A. 10), held that Petitioner is subject to an income tax on income derived from his restricted property.

In opposition to the majority opinion, there is vigorous dissent by the senior member of the Court. This dissent is supported by many opinions of the Attorney General;

by Treasury Decisions of the Treasury Department; by the contemporaneous and long continued practical construction of the Revenue Laws of the United States by its executive officers charged with the administration of the Affairs of Indians, and by repeated decisions of the Federal Courts.

Among these are *Blackbird* v. *Commissioner*, 38 F. (2d) 976 (C. C. A. 10); *United States* v. *Homeratha*, 40 F. (2d) 305, appeal dismissed by stipulation, 49 F. (2d) 1086; and *Pitman* v. *Commissioner*, 64 F. (2d) 740.

Court Decisions.

It is significant that the Respondent's brief does not cite, discuss or attempt to distinguish the important case of *Blackbird* v. *Commissioner, supra.*

This omission is particularly significant in view of Respondent's statement in the memorandum which he filed when joining with the Petitioner for a Writ of Certiorari. On page 2 of that memorandum, the following appears:

> "The question is whether such income is subject to Federal income tax. The Circuit Court of Appeals, by a divided Court, held that it was, and in so doing in effect overruled its earlier decision in *Blackbird* v. *Commissioner*, 38 F. (2d) 976."

The *Blackbird* case was unanimously decided in 1930. In 38 F. (2d) at page 978, the Court said:

> "She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her."

In *Pitman* v. *Commissioner*, 64 F. (2d) 740 (C. C. A. 10), the Court made it clear that the income derived from *restricted property* of a restricted Indian was not subject to income tax and reversed the Board of Tax Appeals, because that Board upheld a levy of income taxes on the income derived from restricted property of a restricted Indian.

In the same opinion the Court made it clear that the income derived from *unrestricted* property of a restricted Indian was subject to an income tax.

Nowhere has any court held that the United States has levied an income tax on the income derived from the *restricted property* of a *restricted Indian.*

Opinions of the Attorney General.

In a number of opinions, the Attorney General has held that the Federal Income Tax laws of the United States do not apply to Indians with a status similar to Petitioner.

See:

34 Ops. A. G. 275 (March 15, 1924).
34 Ops. A. G. 302 (August 14, 1924).
34 Ops. A. G. 439 (March 20, 1925).
35 Ops. A. G. 1 (November 11, 1925).
35 Ops. A. G. 107 (June 24, 1926).

Treasury Decisions.

The Treasury Department has on two different occasions issued two Treasury Decisions, which have held that no income tax has been imposed on the income derived from the restricted property of restricted Indians.

See:

T. D. 3750, Cumulative Bulletin III—1 Page 85.
T. D. 3754, Cumulative Bulletin IV—2 Page 37.

The foregoing opinions embodied in toto the opinions given by the Attorney General, namely:

34 Ops. A. G. 275.
34 Ops. A. G. 439, respectively.

Construction of Income Tax Laws Applicable Here.

The income tax amendment became effective March 1, 1913. Shortly thereafter, a comprehensive income tax law was passed by Congress. For the past 22 years, Congress has repeatedly either enacted or modified the Federal income tax laws.

From the beginning, the various income tax laws have provided that they applied to all individuals and to all income, whatever the source. Notwithstanding this broad language, the various executive departments have held that income tax laws did not apply to the income of restricted Indians derived from restricted property. This interpretation has been uniformly upheld by the Federal Courts, whenever the question has been presented to them.

The familiar rule of statutory construction which properly places great weight on the construction given to the statute by the various executive departments, charged with the interpretation and administration is applicable. This is particularly true, where, as here, the authorities have held against the levying of taxes.

Secretary of the Interior.

In the beginning, the Bureau of Internal Revenue held that the income of the Indian wards of the Government were subject to Federal income taxes. These rulings were questioned by the Secretary of the Interior and an opinion of the Attorney General was requested. In response to this request, the Attorney General ruled that the income tax laws did not apply to the members of the Five Civilized Tribes of which Petitioner is a full-blood member, 34 Ops. A. G. 275.

However, this opinion of the Attorney General did not consider the feature as to whether or not claims for refund were on file to protect the Indians' rights. Accordingly, a further opinion was requested of the Attorney General in respect of this feature.

In response to this question the Attorney General ruled that as to the class (of which Petitioner is a member) the Federal income tax laws were not applicable and accordingly all taxes were refunded whether or not claims for refunds were filed. 34 Ops. A. G. 302.

As to the Indians considered in the foregoing opinions of the Attorney General, there were provisions in the various allotment acts, relative to inalienability and nontaxability. But as to Quapaw Indians, the word "nontaxability" was not used. The allotment act merely provided for inalienability.

The question presented to the Attorney General was whether, under this situation, the Revenue laws were applicable to the income derived from the property of the Quapaw Indians.

In answering this question in the negative the Attorney General said that *inalienability* and *nontaxability* should go hand in hand and that it should not lightly be assumed that Congress intended to tax the ward for the benefit of the guardian. 34 Ops. A. G. 439.

In 35 Ops. A. G. 1, the Attorney General was called upon to construe for purposes of federal taxation the effect of an act of Congress, permitting Oklahoma to levy a State income tax upon the income of a restricted Kaw Indian. The Attorney General held: the fact that he was a restricted Kaw Indian governed, and the fact that Oklahoma was permitted to tax the income was not a sufficient declaration of Congress to permit the imposition of a federal income tax.

In 35 Ops. A. G. 107, the income sought to be taxed was derived partly from the increase in sheep and cattle; partly from a trading post, and partly from a stage line, conducted for carrying tourists through the Hopi Reservation. The Indian there under consideration was restricted but was unallotted. The Attorney General held that the broad language of the Federal income tax law was not sufficient to subject his income to a Federal tax. This opinion of the

Attorney General affirmed an earlier decision of the Interior Department reported at 51 Land Decisions 326 (Jan. 20, 1926).

Thus, although income tax returns were originally required of Indians of Petitioner's status, by executive construction, all such taxes have been authorized for refund.

It is interesting to note that as late as 1929, a refund was made to Petitioner under authority of Treasury Decision 3750, for the years, 1914, 1915 and 1916 (Tr. p. 12). It is the interest on those refunds which is the basis of the deficiency involved herein.

These executive rulings, however, were not applied to the income of restricted Osage Indians and it became necessary to litigate this matter before the Board of Tax Appeals and the Circuit Court of Appeals for the Tenth Circuit.

The case selected as the test case was *Mary Blackbird* v. *Commissioner, supra.* The Board of Tax Appeal held that Blackbird was liable for the tax and on appeal to the Circuit Court of Appeals, Tenth Circuit, this ruling was reversed. The Court held that no income tax could be imposed on the income of a restricted Osage Indian.

The Department of Justice acquiesced in that opinion and no one in its behalf made application to this Court for certiorari.

As a result of the Blackbird decision, all income taxes levied upon and paid by the restricted Osage Indians, have been refunded by the Treasury Department. In addition to this, all cases involving the income taxes of the restricted Osage Indians were dismissed before the Board of Tax Appeals with the order of "No deficiency," and the further order authorizing the refund of all taxes theretofore paid.

Contemporaneous Construction by Executive Officers.

In the recent case of *United States* v. *Jackson,* 280 U. S. 183, this Court announced the familiar and long established rule that (p. 193):

> "• • • such construction [contemporaneous executive construction] is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

Again in *State of Wisconsin* v. *State of Illinois*, 278 U. S. 367, this Court, in discussing the construction given to a statute by the War Department said, on page 413:

> "Nothing is more convincing in its interpretation of a doubtful or ambiguous statute."

Again in *U. S.* v. *Johnston*, 124 U. S. 235, on page 253, Mr. Justice Harlan, speaking for the Court, said:

> "In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In the instant case it is admitted that the Respondent is a restricted Indian and that the property sought to be taxed is restricted property. The question clearly presented is a narrow one, to wit: Did Congress intend to levy an income tax for the year 1929, on the income derived from the restricted property of the Petitioner?

A careful and thorough examination of the various agreements, laws, treaties, executive orders and court decisions, does not disclose a single authority to sustain the claim of the Respondent in the instant case.

The Respondent in attempting to sustain his position cites on page 24 of his Brief, a number of rulings and decisions of various minor officers in the office of the Commissioner of Internal Revenue.

The rule announced by this Court in *Helvering* v. *New*

York Trust Company, 292 U. S. 455, makes the value of these rulings negligible. This Court stated (p. 468):

> "The rulings, I. T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they 'have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law.' See cautionary notice published in the Bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it."

Conclusion.

Over 100 years ago the Creek Indians were taken from their home East of the Mississippi and placed on the bleak and desolate plains of what was then the Indian territory.

Our Government took control of the property of these Indians and administered that property under its direction and control. It made this tribe its wards. The nation made itself the guardian of the Creek Indians.

It was decided many years ago in *Tiger* v. *Western Investment Company*, 231 U. S. 286, that the question of what restrictions should be placed on the Indians and when these restrictions should be removed, was a question under the control of Congress. It has been decided that this power is exclusively under Congress and that the Courts have no jurisdiction over Congress in the matter of exercising this power.

It is insisted that the affirmance of the instant case overrules *Blackbird* v. *Commissioner, supra*. It is plain that the Respondent in the instant case intends, if permitted by this Court, to levy and collect income taxes on all the income derived from the restricted property of all the restricted Indians in our country.

The right to levy taxes against any person should not be doubtful. The intent to levy income taxes against the re-

stricted income of the Petitioner should be plain and definite. The present policy of the United States is not to levy income taxes on the income derived from the restricted property of its restricted wards. If the present plan is to be changed and a new policy adopted, it is for Congress alone to so state in plain and unambiguous terms.

This radical departure from the policy of Congress should not be inferred nor should it be based on communications addressed by one person to another inside the Bureau of Internal Revenue.

The Court below erred in this case. Its judgment should be reversed.

Respectfully submitted,

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May 9, 1935.